



# GOVERNING SECURITY

The Hidden Origins  
of American Security Agencies



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## Preface and Acknowledgments

IN MID-JUNE 2009 I attended a White House meeting to discuss a problem that was causing increasing concern within the federal government. I was then serving on the staff of the White House Domestic Policy Council. I had just wrapped up a discussion of a new statute revising the decades-old Food, Drug, and Cosmetic Act, and thus changing the responsibilities of the Food and Drug Administration (FDA). With food and drug law still on my mind, I rushed down two flights of ornate stairs in the Eisenhower Executive Office Building and into a large conference room just as the meeting was getting started. I will never forget it. The World Health Organization had just declared the existence of the first human influenza pandemic in more than forty years. Spreading with unusual speed, a new H1N1 influenza virus had reached 120 countries and territories in eight weeks. A previous flu pandemic in 1968 had caused approximately one million deaths. Four decades later, previously healthy young people were becoming severely ill. In the United States, the disease had already progressed across the nation from California.<sup>1</sup> Given the potential consequences, American health officials braced for a crisis that could overwhelm the health care system.

The discussion then unfolding touched on far-reaching plans being drawn up to deal with possible school closures, vaccine and hospital bed shortages, and economic disruptions. I remember hearing from worried public health officials that possible mutations could render millions of vaccine doses worthless. Ultimately the virus did not mutate, and Americans were spared the most severe consequences then contemplated. The Centers for Disease Control nonetheless estimate that up to 89 million U.S. cases of H1N1 influenza occurred between April 2009 and the following spring. Nearly half a million Americans were hospitalized.<sup>2</sup>

Two massive federal agencies shouldered the primary responsibility for protecting Americans from this threat: the Department of Homeland Secu-

rity (DHS) and the Department of Health and Human Services (HHS). In the months that followed the pandemic influenza declaration, these agencies answered countless questions about the virus, how they were working together to stop it, how they would spend the \$6 billion or so that Congress appropriated for pandemic response, how they would implement the Stafford Act's provisions governing federal disaster relief operations, and how they would shoulder the rest of their wide-ranging responsibilities while managing the pandemic response. Never once did the two secretaries address the more basic questions of why their agencies existed in the first place, or why these organizations had been entrusted with their precise legal responsibilities to keep Americans safe.

Where did these agencies come from, and what do their origins tell us about how Americans govern themselves? It is a testament to the power of agencies to shape the public imagination that citizens eventually come to think of them as part of the natural order of things, whether in the midst of a crisis involving pandemic influenza or in other moments when people come into contact with them. If it is not lost entirely on the public that these agencies are forged by humans and not by nature, it is probably also true that people often treat the agencies as a permanent fixture—much like the faces chiseled into the cliffs of Mount Rushmore. In fact, when Americans fly on commercial airliners or cross national borders, they can hardly avoid coming into contact with one of those two agencies—the one forged in the shadow of the September 11 terrorist attacks. And when parents take their children to the doctor for a vaccine or purchase food at a supermarket, they do so in a world indelibly shaped by a different federal organization that employs tens of thousands and also endeavors to protect the lives of millions every day.

*Governing Security* investigates the hidden origins of those two agencies: the Roosevelt-era Federal Security Agency (FSA) (which gave rise to the present-day Department of Health and Human Services) and the more recently created Department of Homeland Security. You will discover in the pages to come that these agencies' stories converge on more than the word "security" in each of their names. Beyond their similarities as large federal agencies burdened with nearly impossible security missions, distinctions will also emerge. In the course of exploring the convergence and

contrasts of these two security agencies, I will draw on perspectives from public law, American political development, and organization theory to address some persistent puzzles about their origins and to deliver a new take on debates about national security.<sup>3</sup>

The central thesis that emerges concerns the relationship of *two different kinds of security problems*. Put simply, the idea is this: from the response to Katrina to social security policy to immigration and foreign affairs, the impact of public law in our country depends in large measure on how key players go about securing control of the nation's public organizations, and (in turn) on how organizations are then used to define the contested concept of the nation's security. These problems, moreover, are interconnected through legal interpretations, the work of public organizations within the executive branch, and public attitudes about the role of government. In effect, Americans end up choosing goals not through an elaborate technical process but in lively and overlapping settings where the public is reacting to courts deciding on the scope of presidential power, civil servants at the FDA or FEMA (Federal Emergency Management Agency) are setting priorities, and White House advisors are adjudicating whether agencies protecting communities from risks should be consolidated.

The project of governing security is thus one that is as much about high-minded national aspirations as it is about competitive pressures to achieve political advantage. Specifically, the two interconnected dynamics that are the primary subject of this book—the process of defining the scope of security and politicians' competition to secure control of the bureaucracy—are linked to each other through public organizations, whose power includes shaping the scope of security and whose own structure is in turn shaped by debates about the federal role in providing security. The problems of controlling executive power and defining security are also linked to each other through law and legal interpretations. These regulate the structure, control, and performance of agencies, and the perceptions of the mass public (which can translate into political support and simultaneously affect agency missions as well as the scope of federal power). Hence, political control of public agencies can facilitate policymakers' efforts to shape public perceptions of security and agency capacity to carry out their legal responsibilities. Meanwhile, the future development of these agencies—

and debates about the scope of security—affect the dynamics of political control over public organizations. Central to the argument is the idea that the meaning of the concept “national security” is not fixed, but has instead been given life through choices about the architecture of public agencies such as the FSA and DHS, political strategies, and legal interpretations.

Just as societies make choices about the architecture of public agencies, scholars make choices about the questions they will investigate. For some scholars, the right question to investigate is the one that can be answered with their preferred methods. Much as I admire the scholar who leverages exogenous shocks to create a clever quasi-experimental design, I confess that this project grew around a compelling series of puzzles about organizations, law, and security that have left me no choice but to leverage a variety of methods and literatures. You will find here the results of long days in archival reading rooms. You will read the results of efforts to gather budget data from long-forgotten legislative reports, and analyses of terms used in presidential speeches. The result is an argument built on cautious inferences from history, informed by theoretical insights from the study of public organizations, the case law and commentary grappling with long-standing separation-of-powers questions in American public law, and the institutionally oriented literature attempting to explain the development of the American state.

If it is true that I wrote this book in part to contribute to those scholarly literatures, it is even more true that I wrote it to satiate my own desire to understand how we govern through complicated organizations that no one entirely comprehends. Let me illustrate with an example. If one stands just north of the border between the United States and Mexico, it is simple enough to locate the United States geographically in relation to what appears to be a timeless border, and perhaps just as simple to collapse the distinctions between land, laws, people, and public organizations that constitute a nation. In fact, public organizations are at the core of a far more complicated reality—and their work is all the more remarkable because through their routine functions of patrolling borders, screening food supplies, stamping passports, and operating schools, they make it possible for individuals to think of nation-states as natural features of their world (or even, in some relatively prosperous countries, to all but take for



granted the functions performed by the state). For some of us, the ability of organizations to play this role begs the question of how they evolve, and what we might learn about ourselves when we analyze how our fears and dreams are reflected in public organizations.

These are the reasons why I sought to understand the intersection of law, organizations, and security—and from there it was but a very short step to the FSA and DHS. The more I studied these agencies, the more I sought to discover. As a matter of legal and political history, what emerged struck me as quite a compelling story about how the United States created legal and organizational arrangements designed to further the nation's security. Among other things, I came across many statements from policymakers showing that the early fights over the Federal Security Agency in the late 1930s implicated not only classic inter-branch conflict about presidential prerogatives but also arguments about the case an ambitious president was making to the nation regarding an expansive conception of “security” as broad-based risk management with implications for families and farmers as well as for fighting forces. I found plenty of evidence of strategic discussions deep in the White House on how executive reorganization could recalibrate the power of the presidency relative to Congress. I learned how White House and Federal Security Agency officials worked together to channel federal funds into secret research on offensive biological weapons. I found evidence that Roosevelt's reorganization efforts, though not necessarily motivated by simple concerns over financial efficiency (which was the legal prerequisite Congress established for using his reorganization powers), created an agency with increasing capacity to implement risk management and economic security policies that Roosevelt greatly supported. While my investigation of DHS was more challenging because of limited access to archival resources, an analysis of the agency's early history also reveals continuing debates about the scope of the agency's security-related mission and the order of its priorities.

Bringing some of these ideas to light remained a priority, and became possible only because of the generous support of extraordinary colleagues, friends, and family members. Dara Cohen and Barry Weingast collaborated with me on some early research on the Department of Homeland Security that is included in portions of Chapters 5 and 6, and Connor Raso

worked with me on a project that generated some of the ideas included in Chapter 7. Lively conversations with Barry, my friend and graduate school dissertation advisor, were also enormously helpful in developing the argument. At Stanford Law School, I will be ever grateful to Larry Kramer; even in the midst of his work as dean, he focused some of his energy on encouraging me to stay focused on this project. Pam Karlan's friendship and insights have done much to inspire my scholarship over the years, and this project is no exception. My Stanford Law School colleagues Joe Bankman, Richard Craswell, Michele Dauber, Richard Ford, Barbara Fried, Deborah Hensler, Dan Ho, Mark Kelman, Michael McConnell, Jane Schacter, Al Sykes, and Robert Weisberg have been kind, time and again, with their wisdom and insight. I am also grateful to the staff of the Stanford Law School library, including the incomparable library director, Paul Lomio, and the indefatigable Erika Wayne and George Wilson. Across the Stanford campus, I have been lucky enough to be a member of the Center for International Security and Cooperation (CISAC) at Stanford's Freeman Spogli Institute for International Studies. Through CISAC I have also gained friends and colleagues who have greatly enriched this project. I am particularly indebted to Scott Sagan, Lynn Eden, David Holloway, Paul Stockton, and David Kennedy (who offered some particularly helpful reactions at a CISAC seminar where I presented an early version of my research). And I will be ever grateful to Suzanne Keirstead.

Beyond Stanford, I benefited from the reactions of a number of scholars who have also been generous with their feedback, including Malcolm Feely, Matthew Stephenson, Rachel Barkow, Jacob Gersen, Jerry Mashaw, Daniel Carpenter, and David Zaring. Two anonymous reviewers also offered helpful comments. John Ferejohn and Lewis Kornhauser at NYU Law School were kind enough to host a long workshop on an earlier version of this project. There I received stimulating ideas from their students and from political scientists Sandy Gordon and Bernard Grofman. I also benefited greatly from opportunities to present portions of the manuscript at Berkeley, Hastings, and Cornell. My editor, Kate Wahl, of Stanford University Press, has been an indispensable ally without whom this book would still be a stack of marginally legible notes on napkins. I benefited enormously from the work of helpful staff at Archives II in College Park, Maryland,

who helped me find a trove of files on the War Research Service (reading through them immediately brought to mind the theme music from a scene in *Raiders of the Lost Ark* when Indiana Jones discovers the Ark). Similarly helpful were the staff at the Franklin D. Roosevelt Presidential Library in Hyde Park, New York, and at the Harry S. Truman Presidential Library in Independence, Missouri.

Not far from the Truman Library in Independence is a granite and limestone monument to the American soldiers who fought in World War I. On a cold December afternoon, when I was close to wrapping up the archival work for this book at the Truman Library, I drove out to Kansas City to see the monument. Built into the hill from which the monument rises is a museum describing the families and towns the soldiers were leaving. At nearly every turn, the pictures and documents on display underscored how the soldiers' achievements were built in some sense on the relationships with family, friends, and mentors that shaped their lives. In a similar vein, I will always feel a special appreciation for Mary Schroeder and Lawrence Friedman, both of whom taught me more than they know about being a lawyer and being a scholar (Lawrence might be surprised by the "lawyer" part). I thank my friends Jose Luis Rojas and Delia Ibarra for their unfailing support of this project and its author. I am blessed with two parents who shared their dreams and helped my brother, Máximo, and me forge the means to make ours come true. Most of all, I am grateful for my wife, Lucy, and our children, Mateo and Ria. They are my dream come true—a dream capable of making even me stop thinking about governing or security. For that remarkable feat and far more, I dedicate this book to them.

## List of Abbreviations and Acronyms

AMA	American Medical Association
APHIS	Animal and Plant Health Inspection Service
ATF	Bureau of Alcohol, Tobacco, and Firearms
CBP	Bureau of Customs and Border Protection
CIA	Central Intelligence Agency
CIS	Citizenship and Immigration Services
CWS	Office of Community War Services
DEA	Drug Enforcement Administration
DHS	Department of Homeland Security
DOE	Department of Energy
DOJ	Department of Justice
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FBI	Federal Bureau of Investigation
FDA	Food and Drug Administration
FEMA	Federal Emergency Management Agency
FSA	Federal Security Agency
FTC	Federal Trade Commission
GAO	Government Accountability Office
HEW	Department of Health, Education, and Welfare
HHS	Department of Health and Human Services
HSA	Homeland Security Act
HSARPA	Homeland Security Advanced Research Projects Agency
HSIS	Homeland Security Impact Statement

HSO	Homeland Security Office
HUD	Housing and Urban Development Agency
ICE	Immigration and Customs Enforcement
ICS	Incident Command System
IEEPA	International Emergency Economic Powers Act
INS	Immigration and Naturalization Service
NAACP	National Association for the Advancement of Colored People
NHTSA	National Highway Traffic Safety Administration
NIH	National Institutes of Health
NLRB	National Labor Relations Board
NSA	National Security Agency
NSC	National Security Council
OIRA	White House Office of Information and Regulatory Affairs
OSHA	Occupational Safety and Health Administration
PEOC	Presidential Emergency Operations Center
PFO	Principal Federal Official
PHS	Public Health Service
SEC	Securities and Exchange Commission
SSB	Social Security Board
TSA	Transportation Security Agency
WRS	War Research Service

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# The Twin Problems of Governing Security

A GRAY DAWN BEGAN TO BREAK over New Orleans on Monday, August 29, 2005, as Hurricane Katrina ripped into the Louisiana Coast. It was 6:10 a.m.<sup>1</sup> At that moment, as thousands of people stuck in the Crescent City were still scrambling to find shelter from the storm, the winds were powerful enough to make even the waters of the mighty Mississippi River reverse course to flow away from the ocean.<sup>2</sup> Less than two hours later, a barge broke loose from its moorings, smashing into New Orleans's Industrial Canal. Before long, millions of gallons of water were spilling onto the residential streets of the Lower Ninth Ward and St. Bernard Parish. Upon learning of the breach, the National Weather Service predicted flash floods of up to eight feet of water. The water did not reach the Superdome, where ten thousand refugees had gathered. But the hurricane did. Shortly after the flash flood warning, Katrina tore two holes in the roof of the arena. Elsewhere in the city, water from multiple drains preaches mixed with fuel and industrial runoff. By early afternoon, the beaches were well on their way to placing much of New Orleans under a muddy soup of polluted water, and no fewer than eight Gulf Coast refineries had shut down.<sup>3</sup>

Severe though these consequences were, they did not come as a complete surprise to some public officials. The preceding Friday, three days before Hurricane Katrina struck, Governor Kathleen Blanco had declared a state of emergency in Louisiana.<sup>4</sup> She authorized National Guard commanders to call up to 2,000 reservists to active duty.<sup>5</sup> Governor Blanco ordered an additional 2,000 Guardsmen to active duty the next day.<sup>6</sup> On Sunday, August 28, the state adjutant general, Major General Bennett C. Landreneau, established five task forces to conduct aviation search-and-rescue missions, to deliver food, water, and other supplies, and to help the Corps of Engineers repair storm levees.<sup>7</sup> National Guardsmen also helped implement contraflow—the use of all lanes of the highway system for outbound traffic only—by directing traffic and erecting barriers.<sup>8</sup> Not



to be outdone, New Orleans mayor Ray Nagin followed suit on Sunday, declaring his own state of emergency and directing legal counsel to explore whether the mayor could legally force recalcitrant individuals to leave town without facing liability.<sup>9</sup> While state and local officials across much of Louisiana were scrambling to determine how best to protect their citizens and the delicate infrastructure of a region that partly sat below sea level, other Gulf states such as Mississippi also declared states of emergency and began efforts to protect the security of their residents.<sup>10</sup>

On Saturday morning, however, President George W. Bush was, ironically, focused on a different sort of security issue altogether. In his weekly radio address, the president covered the challenges faced by U.S. foreign policy with respect to the Middle East peace process and the Gaza Strip.<sup>11</sup> Although the president had also declared that a “state of emergency” existed in Louisiana and ordered federal agencies to assist state and local authorities, several reports indicate that two key officials in charge of managing that effort—Homeland Security secretary Michael Chertoff and Federal Emergency Management Agency director Michael Brown—did not mobilize the National Guard at that time.<sup>12</sup> Indeed, on Tuesday, several hours after Katrina hit the Gulf Coast, President Bush proceeded with a previously scheduled speech in San Diego discussing the history of America’s involvement in World War II and calling on the nation to continue supporting the deployment of American soldiers to Iraq.<sup>13</sup> Even as the president addressed events thousands of miles beyond American shores, a different cluster of security issues was emerging along the Gulf of Mexico. There the looming disaster posed risks to the American energy infrastructure, and to hundreds of thousands of people, in the path of the vast storm. The people and infrastructure of the Gulf Coast region—as richly demonstrated by the infamous British Petroleum oil spill five years later—were all the more exposed because they found themselves in a fragile, low-lying region of bayous, refineries, and oil rigs crisscrossed by canals and by the waters of the Mississippi.

By Tuesday, August 31, fully 80 percent of New Orleans was underwater. Tens of thousands of its residents had themselves flooded into downtown seeking shelter.<sup>14</sup> For five days, about 20,000 people waited inside the Ernest N. Morial Convention Center in New Orleans, turning it into